

Federal Court



Cour fédérale

Date: 20111207

Docket: T-2090-10

Citation: 2011 FC 1437

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, December 7, 2011

PRESENT: Richard Morneau, Prothonotary

BETWEEN:

DORIS TREMBLAY

**Plaintiff/
Defendant by Counterclaim**

and

ORIO CANADA INC.

**Defendant/
Plaintiff by Counterclaim**

REASONS FOR ORDER AND ORDER

[1] **UPON** reading the motion records of the parties and hearing their counsel on a motion by the plaintiff and defendant by counterclaim (the plaintiff) for leave to amend his statement of claim in accordance with the draft submitted and for a ruling on the defendant's objections to the production of certain financial and commercial documents;

[2] **WHEREAS** this motion is, more specifically, part of an action for copyright infringement commenced by the plaintiff in relation to control software for automobile dealerships, and whereas the plaintiff states that he developed and improved this software (the modified SAM) and considers himself the owner of the copyright;

[3] **WHEREAS** it is appropriate to deal first with the plaintiff's motion to amend and to bear in mind that, in addition to the minor amendments, the primary amendment the plaintiff seeks to add stems from the fact that the examination for discovery of the defendant's representative revealed that the defendant permitted a third party, Groupe Enode inc., to make a complete copy on a server of the source code at issue and that this unauthorized copy was subsequently installed on servers belonging to the defendant's clients. The plaintiff now wishes to allege this situation so that the issues between the parties are properly defined;

[4] **WHEREAS** with respect to the principles that apply to the amendment of pleadings, the following passage from *Canderel Ltd v Canada*, [1994] 1 F.C. 3 (C.A.), at page 10, clearly reflects the latitude that the Court must demonstrate in this matter:

. . . while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[5] **WHEREAS** as a backdrop to these observations, it may be added that in the case of an amendment, as in an application to strike a proceeding, the amendment should be allowed unless

it is plain and obvious that the amendment is bound to fail (see *Raymond Cardinal et al. v Her Majesty the Queen*, unreported decision of the appeal division of this Court dated January 31, 1994, docket A-294-77, Heald, Décary and Linden JJ.A.);

[6] **WHEREAS** the Court cannot conclude at this stage that the amendments sought are bound to fail, notwithstanding that the defendant seems to consider that the plaintiff's action is, from the outset, an act of vindictiveness and bad faith;

[7] **THUS**, in light of the preceding reasons and the principles set out in *Canderel* and *Cardinal* above, the Court intends to comply with the plaintiff's request for amendments;

[8] **WHEREAS**, with respect to the request for a ruling on the objections, the remedy sought by the plaintiff consists, in fact, in obtaining production of the following documents (the documents sought) from the defendant:

- a list of the defendant's current clients (fifth request);
- the invoices sent since June 2009 to the defendant's clients (sixth request);
- a copy of the contracts signed since June 2009 between the defendant and its clients (seventh request).

[9] **WHEREAS** the Court regards the production of these documents as relevant for the purposes of identifying potential witnesses and calculating damages;

[10] **WHEREAS** the defendant, in fact, does not oppose the production of the documents as such but requests that these documents be disclosed to counsel for the plaintiff only and not to the plaintiff himself;

[11] **WHEREAS** after reviewing the parties' motion records, their counsel's representations at the hearing, and the principles set out by this Court in *Merck & Co. v Brantford Chemicals Inc.* (2005) 43 C.P.R. (4th) 233 and *Pharmascience Inc. v Glaxosmithkline Inc.*, 2007 FC 360 (Hughes J., April 3, 2007), the Court finds however that the defendant has not established unusual circumstances within the meaning of *Brantford Chemicals* and *Pharmascience* that would lead the Court to disregard the fact that the plaintiff himself should also have access to the documents sought;

[12] **WHEREAS** the Court also finds that it does not have the evidence that would support calling into question the honesty and trust that the plaintiff and his counsel will comply with a confidentiality order that includes them. Furthermore, both parties know very well that they are bound by the implied undertaking rule with respect to the subsequent use of information obtained in the course of litigation;

[13] **WHEREAS** the Court believes that these parties are not involved in parallel proceedings in foreign jurisdictions and should not be viewed as competitors;

[14] **WHEREAS**, as discussed in court, the Court considers—as is the widespread practice—that counsel for the parties may and shall agree on a draft protection order that does not leave out the plaintiff himself and that the documents sought shall be produced within 20 days after such a

draft order is signed, a draft protection order that shall be jointly submitted to the Court on or before December 16, 2011;

ORDER

THE COURT

1. **AUTHORIZES** the plaintiff to amend his statement of claim in accordance with the draft enclosed with his letter of November 30, 2011, by serving and filing the amended statement of claim on or before December 13, 2011;
2. **AUTHORIZES** the parties subsequently to amend their pleadings as a result, in accordance with the time limits prescribed in the *Federal Courts Rules*;
3. **ORDERS that** counsel for the parties agree on a draft protection order that does not leave out the plaintiff and that the documents sought be produced within 20 days after such a draft order is signed, which draft order shall be jointly submitted to the Court on or before December 16, 2011;
4. **PERMITS** the plaintiff to continue and to complete his examination of the defendant's representative, François Gagné, on the answers provided following his examination of July 5, 2011, and on the questions that also arise reasonably from the documents sought to be provided, on a date agreed to by counsel for the parties as long as the continuation of the examination takes place on or before January 13, 2012.

Costs in the cause.

“Richard Morneau”

Prothonotary

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2090-10

STYLE OF CAUSE: DORIS TREMBLAY and
ORIO CANADA INC.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 5, 2011

**REASONS FOR ORDER
AND ORDER:** MORNEAU, P.

DATED: December 7, 2011

APPEARANCES:

Pascal Lauzon

FOR THE PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

André J. Bélanger

FOR THE DEFENDANT/
PLAINTIFF BY COUNTERCLAIM

SOLICITORS OF RECORD

BCF s.e.n.c.r.l.
Montréal, Quebec

FOR THE PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

André J. Bélanger
Montréal, Quebec

FOR THE DEFENDANT/
PLAINTIFF BY COUNTERCLAIM